Landmark Case

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SEXUAL ORIENTATION AND THE *CHARTER*
VRIEND v. *ALBERTA*

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Vriend v. Alberta (1998)

Delwin Vriend was employed as a laboratory coordinator at a Christian college in Edmonton, Alberta. He had received positive evaluations, salary increases and promotions for his work performance. In January 1991, Mr. Vriend was fired by the college. The only reason given by the college was that he did not comply with its policy on homosexual practice: Mr. Vriend was fired because the college had become aware that he was a gay man.

In June 1991, Mr. Vriend filed a complaint with the Alberta Human Rights Commission on the basis that his employer had discriminated against him because of his **sexual orientation**. In July 1991, the Commission told Mr. Vriend that he could not make a complaint under the *Individual's Rights Protection Act* (*IRPA*) of Alberta because sexual orientation was not included in the **list of protected grounds** in section 7(1) of the *IRPA*.

Individual's Rights Protection Act

The *IRPA* was a statute passed by the Legislative Assembly of Alberta. Section 7(1) of the *IRPA* stated:

> **7(1)** No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.

If Mr. Vriend had been fired because of his race, for example, he would have been allowed to file a complaint against the college with the Human Rights Commission. However, because sexual orientation was omitted from the list in section 7(1), the Human Rights Commission could not help him.

Mr. Vriend and several groups that advocated for gay and lesbian rights applied to the Court of Queen's Bench of Alberta for a declaration that the *IRPA* violated the equality guarantee contained in s. 15(1) of the *Charter of Rights and Freedoms* due to the omission.

Canadian Charter of Rights and Freedoms, 1982

The *Charter* is a part of the Constitution of Canada. Section 15(1) of the *Charter* states:

> **15(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination …

After hearing the arguments of the **applicants** (Mr. Vriend and the advocacy groups) and the **respondent** (the Attorney General of Alberta, representing the provincial government), Judge Russell decided that s. 7(1) and several other similar sections of the *IRPA* were **unconstitutional**. These sections were unconstitutional because they violated the *Charter*. Specifically, they violated the equality provision of the *Charter* (s. 15) and that these violations were not justified as reasonable limits permitted under s. 1 of the *Charter*. Therefore, on April 12, 1994, Judge Russell ordered that s. 7(1) and the other sections of the *IRPA* "be interpreted, applied and administered as though they contained the words 'sexual orientation'." This remedy is known as **"reading in"**: the court effectively added the words "sexual orientation" into the *IRPA*. From that day onwards, the Alberta Human Rights Commission would be required to offer protection to those who suffered discrimination on the basis of sexual orientation, such as Mr. Vriend.

Appeal to the Alberta Court of Appeal

The government of Alberta disagreed with this judgment and **appealed** to the Alberta Court of Appeal. The panel of three judges who heard the appeal were divided as to the outcome. Justices McClung and O'Leary ruled that the *IRPA* did not violate the *Charter*. However, Justice Hunt agreed with the lower court's decision. By a margin of two-to-one, the Court of Appeal reversed the decision of the lower court.

Appeal to the Supreme Court of Canada

Mr. Vriend was not satisfied with this result and applied for permission to have his case heard by the Supreme Court of Canada, the highest appellate court in the country. The Supreme Court hears only the most important appeals from all the provinces and territories, and its decisions are final: they cannot be appealed to any other court. Mr. Vriend's case was heard by the Supreme Court on November 4, 1997, and the written decision was released on April 2, 1998.

The majority of the Supreme Court held that the provisions of the *IRPA* were unconstitutional, reversing the decision of the Court of Appeal. Justices Cory and Iacobucci, who wrote the majority decision, described equality rights as "fundamental to Canada" and stated that they "reflect the fondest dreams, the highest hopes and the finest aspirations of Canadian society." In order to achieve "the magnificent goal of equal dignity for all … the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of that person."

The Supreme Court decided that the provisions of the *IRPA* breached the equality provisions of the *Charter* because the omission of "sexual orientation" from the list of protected grounds created a distinction that had the effect of discrimination, which is prohibited by s. 15(1).

The Attorney General of Alberta argued that the *IRPA* treated homosexuals and heterosexuals equally. To understand this argument, consider this hypothetical example: a homosexual person is fired because of his or her race, and a heterosexual person is also fired because of his or her race. Because "race" is listed in s. 7(1) of the *IRPA*, both the homosexual person

and the heterosexual person are protected. They can both file a complaint with the Alberta Human Rights Commission, so both the homosexual person and the heterosexual person are treated equally. On the other hand, if a homosexual person and a heterosexual person are both fired because of their sexual orientation, neither person is protected, because "sexual orientation" is not listed in s. 7(1) of the *IRPA*. According to this argument, both the homosexual person and the heterosexual person are being treated equally as well, because neither one can file a complaint with the Commission.

The Supreme Court rejected this argument because it only addressed the issue of **formal equality**. Instead, it stated that the *Charter* guaranteed **substantive equality**. The concept of substantive equality requires judges to look beneath the surface and consider the underlying social context. How does the law actually affect Mr. Vriend and people like him? If there are social circumstances that may not be obvious from just looking at the words of the *IRPA*, then those must be considered as well.

In this case, it was important to consider the social reality of discrimination against gays and lesbians. In our society, if a person is discriminated against on the basis of sexual orientation, most of the time it will be because that person is homosexual, not because that person is heterosexual. Although it is possible that a heterosexual person could be discriminated against because of his or her sexual orientation, this is far less likely to occur than discrimination against a homosexual person on that same basis. Thus, the omission of "sexual orientation" from the *IRPA* was far more likely to have a negative impact on homosexual persons than on heterosexual persons. For that reason, gays and lesbians were denied "the right to the equal protection and equal benefit of the law" as guaranteed by s. 15(1).

Furthermore, the Supreme Court held that this breach of s. 15(1) was not justified as a reasonable limit to guaranteed rights as permitted by s. 1 of the *Charter*. In conclusion, the Supreme Court held that the sections of the *IRPA* were unconstitutional and that "sexual orientation" should be read into the *IRPA* as a protected ground.

Classroom Discussion Questions

1. Who were the applicants in this case? Who was the respondent?

2. a) What is the name of Alberta's main trial court, where most civil or non-criminal cases begin?

   b) If a decision of that court is appealed, which court will hear the appeal?

   c) What is Canada's final court of appeal, which hears cases from all the provinces and territories, and from the Federal Court?

3. a) Which level of government passed the *Individual's Rights Protection Act?*

   b) What is the purpose of s. 7(1) of the *IRPA*?

4. What is the purpose of s. 15 of the *Charter*?

5. In your own words, explain the difference between formal equality and substantive equality.

6. Do you think the Supreme Court of Canada's decision was fair? Explain with reference to its use of the substantive equality argument.

7. Does the following argument reflect formal equality or substantive equality? "In my view, a man should only be allowed to marry a woman. This is not discrimination because what I am saying is that both homosexual and heterosexual men can marry, as long as they marry someone of the opposite sex. Thus, both homosexuals and heterosexuals are treated equally."

Vriend v. Alberta : Worksheet 1

Constitutional Law vs. Statutory Law vs. Common Law

Canada is a bijural country: two different legal systems exist within one country. The province of Quebec uses the civil law system in its private law (which governs relations between individuals), whereas all the other provinces use the common law system for both their private *and* public law (which governs relations between individuals and the state). It follows that the common law system is the one system used throughout Canada but just for public law. This worksheet will introduce you to the common law system.

In the common law system, laws can be classified into three main categories: constitutional law, statutory law and the common law. The courts in the *Vriend* case applied the first two types of law.

Constitutional Law

Constitution Act, 1982

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52(1) of the *Constitution Act, 1982* makes the Constitution of Canada the supreme law of Canada. This means that if any laws in the other two categories (statutory law or common law) violate the Constitution, those laws cannot be applied. The Constitution of Canada includes several written documents (such as the *Constitution Act, 1867* and the *Charter of Rights and Freedoms*) as well as unwritten principles or conventions.

In *Vriend*, the courts considered section 15(1) of the *Charter*, which guarantees equality rights.

Statutory Law

Statutes are laws enacted by the Parliament of Canada or by the provincial or territorial legislative assemblies. One example is the *Individual's Rights Protection Act*, which was passed by the Legislative Assembly of Alberta.

When a statute conflicts with the Constitution, the statute cannot be applied, because the Constitution is supreme. In *Vriend*, the Supreme Court held that section 7(1) of the *IRPA* was in violation of the *Charter*. Thus, section 7(1) had to be changed to comply with the equality guarantee in section 15(1) of the *Charter*.

Common Law

When a judge is faced with a legal problem, and neither the Constitution nor the statutes deal with the problem, the judge will have to make a decision based on what he or she thinks is fair and just. The judge will almost certainly be guided by how other judges have dealt with similar legal problems in the past. The entire collection of all of these decisions made by judges through the years is the common law.

Activity

If you were a judge, how would you decide the following cases?

Case #1

After you conduct some legal research, you find that a part of the Constitution says one thing, but a statute enacted by the Parliament of Canada says the opposite. Which law do you apply?

Case #2

You find that other judges in old cases have decided one way, but a statute recently enacted by the Legislative Assembly of Ontario says the opposite. Do you apply the statute or do you follow what other judges did in the old cases?

Case #3

Pretend that the legislature passes a statute, which says that everyone is allowed to borrow books from public libraries for free, except those of a certain racial background. Using your knowledge of section 15(1) of the *Charter*, do you apply this statute?